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CONFIDENTIAL FRE 408 SETTLEMENT COMMUNICATION

VIA EMAIL
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VIA EMAIL
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Re: Gilt Edge Superfund Site—Allegations Against Hecla Limited

Dear Heidi and Andrea:

We wanted to thank you and your team for meeting with us last week to discuss the position of CoCa Mines, Inc. ("CoCa") on allocation at the Gilt Edge Superfund Site (the "Site"). We also wanted to follow up in writing on the issue of the United States' allegations against Hecla Limited ("Hecla") at the Site.[1]

The United States' allegations against Hecla are based on Hecla's status "as the successor to CoCa Mines, Inc., an owner/operator at the time hazardous substances were disposed of at the Site." General Notice of Superfund Liability, July 12, 2013.

A party is liable under CERCLA only if it is a "covered person" within one of four classes of liable parties. 42 U.S.C. § 9607(a); *United States v. TIC Inv. Corp.*, 68 F.3d 1082,

[1] As noted in our prior correspondence, Hecla Limited was formerly known as Hecla Mining Company. The name change occurred in 2006.

1086 (8th Cir. 1995). This includes a past owner or operator, which is "any person who *at the time of disposal* of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2) (emphasis added). Hecla has never owned property or operated at the Site and has no connection otherwise to the Site. Therefore, it is not one of the classes of parties who are potentially liable under section 107 of the statute.

Nor is Hecla derivatively liable for CoCa's actions at the Site. Hecla had no ownership interest in CoCa until 1991, several years after CoCa or its predecessor, Congdon & Carey Ltd. No. 5, held any interests at the Site. The United States Supreme Court has recognized that CERCLA does not "rewrite" traditional common law principles of corporate law, including the "general principle . . . deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 63 (1998). Thus, a parent corporation can be held derivatively liable under CERCLA for the acts of a subsidiary corporation *only when* the circumstances justify piercing the subsidiary's corporate veil. *Id.* In particular,

> [f]or liability to attach under the alter ego doctrine, the control required amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation with no separate mind, will or existence of its own. . . . the relevant inquiry into the control issue focuses on the relationship between the parent and the subsidiary *at the time the acts complained of took place* . . . *The rationale underlying this principle is that the parent must be in control of the subsidiary to be held liable for the subsidiary's actions*."

U.S. v. Wallace, 961 F. Supp. 969, 978-79 (N.D. Tex. 1996) (internal citations omitted) (emphasis added).

Applying this principle, the court in *Wallace* declined to hold the parent liable for the acts of the subsidiary, as the parent did not have any ownership interest in the subsidiary until 1979, and thus could not be held liable based on veil-piercing for arranging hazardous waste shipments that occurred in 1976 and 1977. *Id.* at 979. *See also IBC Mfg. Co. v. Velsicol Chemical Corp.*, 187 F.3d 635 (6th Cir. 1999) (unpublished) (finding that to pierce the corporate veil, parent must have exercised control over subsidiary "*at the time of the transaction complained of*," and because the subsidiary ended its pesticide manufacturing activities in 1988, before the parent corporation was aware of potential environmental liabilities, no liability could attach to parent for those activities); *Bedford Affiliates v. Sills*, 156 F.3d 416, 431 (2d Cir. 1998), *overruled on other grounds by W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 91 (2d Cir. 2009) (declining to pierce the corporate veil because owner of contaminated property failed to show that shareholder's control of subsidiary company led to the property's contamination); *In re Advanced Packaging & Products Co.*, 426 B.R. 806, 823 (C.D. Cal. 2010) (holding that because

the parent's alleged corporate acts did not cause contamination, the creditor could not pierce the bankrupt subsidiary's corporate veil).

Here, there is no set of facts that EPA could allege to justify veil-piercing. As noted above, the period of alleged interest in the area on the part of CoCa or its predecessor predates Hecla's acquisition of CoCa by several years. As such, Hecla could not have possibly exercised the type of control over CoCa's actions necessary to justify piercing the corporate veil. Thus, EPA has no claim for costs against Hecla under section 107(a) of CERCLA, and any attempt by EPA to bring a claim against Hecla to recover such costs would not survive a motion to dismiss.

You were both copied on our December 16, 2013 correspondence detailing why the same theory for holding Hecla liable at the Nelson Tunnel Superfund Site is flawed. We still believe it would be beneficial to have, and we again request, a lawyers' meeting to discuss these important, common legal questions associated with the United States' claims against Hecla at both the Gilt Edge and the Nelson Tunnel/Commodore Waste Rock Pile sites.

Sincerely yours,

Elizabeth H. Temkin
Joseph G. Middleton

EHT/jli

cc (via email): Laurianne Jackson
Jerel Ellington
Michael Clary